No. 4.

Brief of Earle for Appts.

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Supreme Court of the United States

OCTOBER TERM, 1896.

No. ~~40~~ 4.

AMADO CHAVES ET AL., *Appellants,*

vs.

THE UNITED STATES ET AL.

Argument for Appellants.

HENRY M. EARLE,
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PRESS OF W. F. ROBERTS, WASHINGTON, D. C.

Supreme Court of the United States

OCTOBER TERM, 1896

No. 40

AMADO CHAVES ET AL., *Appellants*,

vs.

THE UNITED STATES ET AL.

The facts in this case are as follows:

During the early part of the year 1788, Francisco Garcia de Noriega and his brother, Antonio Garcia de Noriega, petitioned the Governor of New Mexico for a grant of land in the Canon de San Diego, the same being unoccupied and vacant.

On January 27, 1788, the Governor, Fernando de la Concha, granted the petition of said Noriegas, and issued a granting decree in the following form:

> "SANTA FE, January 27, 1788.
>
> I grant in the name of the king, for cultivation and working, the land that the petitioners solicit, the chief alcalde of the Queres, Don Antonia Armenta, placing them in possession thereof, provided that no prejudice whatever results to the Indians or to any of the citizens settled in that vicinity; and, this being done, he will at the end of this decree place the said act of possession, without injury to any third party, to be copied in the government book and written on stamped paper when it reaches this province.
>
> CONCHA."

On February 6 of the same year the chief alcalde aforesaid, with all the formalities required by the law, placed the parties in juridical possession of the tract, with well defined natural boundaries. It does not appear that the whole of the canon was granted, but only a portion of it, to wit: From the waterfall on the north to the junction of the rivers on the south, the east and west boundaries being the sides of the canon.

In 1798 some twenty persons, apparently including the two grantees aforesaid, petitioned the governor in the ordinary form, and, after reciting the fact that there was a quantity of uncultivated land "lying in the Canon de San Diego adjoining the boundaries of the lands belonging to the Indians of the town of Jemez," prayed for a grant of vacant land beginning at the lands granted the Indians of said pueblo.

The then governor, Fernando Chacon, thereupon granted the petitioners the land asked for, with the express condition that they should never sell or alien the same, and directed the same alcalde, Antonio Armenta, to place them in possession under the rules prescribed by law.

On March 14, 1798, the chief alcalde aforesaid, after measuring the league belonging to the Indians at Jemez, found a surplus of 2,100 varas which the Indians claimed without right. He then proceeded to the surplus lands mentioned, and placed the grantees in possession of 300 varas each within certain outboundaries, the latter including the tract granted in 1788. Just after the delivery of juridical possession the alcalde executed and delivered the following certificate to the two Noriegas, the grantees under the grant of 1788:

> "In the Canon de San Diego de Jemes, on the fourteenth day of the month of March, year seventeen hundred and ninety-eight, before me, Antonio de Armenta, and there being assembled all the citizens who took possession in said canon, together with Francisco Garcia de Norega and Antonia Garcia de Norega, two brothers of the first possessors, said two Garcias declared in a loud and clear voice, which all heard, because they shouted

it with much distinctness, and they all unanimously agreed to abide by what was said by the said Garcias, and their reasons were these:

"Friends and brothers, now each one of you is about to take the lands which his majesty has granted and donated to you; but you are all notified that the lands which we first and in our first grant we have been possessing, be all of you aware that I and my brother are going to enjoy the same freely, without any of those present nor their children nor anybody else shall desire to interpose obstacles, and because as first possessors we have the right to enjoy said lands and to cultivate them with full title, as well ourselves, our children, and our successors; and so that none of those who are present may plead ignorance we have so spoken to-day there being no one absent.

"The said Garcias having made all the remarks, all unanimously replied that they asked reasonable justice, and that neither by themselves, their children, nor successors would there be interposed any suit or demand against them at any time, and if they perchance should wish to do so they would take the case until leaving them in peace concerning the said land which they had been so justly possessing.

"All here set forth I, the said chief alcalde, witnessed, for all the citizens declared that it was not to them any imposition that the Messrs. Garcias should enjoy the lands which they were heretofore cultivating, and that it may so appear whenever requisite I make this document in favor of the said two Garcias. I signed the same with those of my attendance in the aforesaid canon in said day, month, and year, to which I certify.

"ANTO DE ARMENTA."

In 1808 it appears that the grantees under the grant of 1798 began to claim title and to encroach upon the possessions of the grantees under the senior grant; and on December 1, 1808, the alcalde of the jurisdiction sent the following communication to Jose Manrique, the governor *ad interim* of the province:

"GOVERNOR: The interpreter of the Navajos, Antonio Garcia, has presented to me a document of grant executed to him by the former alcalde of this jurisdiction,

Antonio de Armenta, under the decree of Don Fernando de la Concha, as appears from the grant itself, and the whole of the Jemez cañon having been settled under an order of Don Fernando Chacon in a royal grant made to them and in which is embraced the land granted to the Garcias, whence results contention between the ones and the others, the latter grantees alleging title to all the land; and I deeming that the title claimed by Antonio Garcia is founded in law, he having been the prior settler for the period of ten years, with the condition that at the time they were given possession all the new settlers gave their consent, as said Garcia makes appear by a document which the alcalde executed to the two brothers and which I inclose to you, together with the grant of the Garcias, so that after seeing the same you may order whatever you shall deem proper, and may, if Garcia has a right to the land claimed, confirm and approve the same, to obviate all question which will necessarily result if the latter be not decided by your superiority, by decreeing whether the land of the Garcias is included or not in the grant of the last settlers, and whether a copy of this grant be taken so that the original, which is the one I enclose, may remain in the archives of the government confirmed by you, and the same should be done with the copy, subject to what you may direct, which will be the best and most correct, your ordering what I shall do to avoid proceedings annoying your attention.

God preserve you many years.

IGNACIO SANCHEZ VERGARA.

Santa Ana, 1st of December, 1808.

Lieutenant-Colonel JOSE MANRIQUE."

On December 13, 1808, the Governor replied to this communication of the alcalde as follows:

Advised of your official communication of the 1st instant and documents you accompany.

I have to state to you that the subject does not require any decision of mine inasmuch as the grant of the Garcias makes their right clear, which grant, being the older, always has the preference.

The last settlers cannot deny to the Garcias the better title, and so these should always remain on the same

grant which they have held hitherto; and if the said new settlers do not coincide you will not permit to them recourse for any such which they may possess they will have to the royal audience of Guadalajara, as the documents referred to were sanctioned by former governors of this province and the said royal audience alone can annul them; with which I answer your official communication aforementioned.

I return to you the documents mentioned that you may deliver them to the party interested.

God preserve you many years.

Santa Fé, 13th December, 1808.

To the alcalde of Jemez.

About the year 1879 the grant of 1788 was presented to the surveyor-general of New Mexico, pursuant to the provisions of the act of July 22, 1854; the title papers and witnesses were produced, and on March 22, 1880, the surveyor-general approved the grant, and certified the same to Congress for confirmation. No action was subsequently taken by that body, and the descendants of the original grantees presented their petition to the United States Court of Private Land Claims under the provisions of the act of March 3, 1891.

Continuous occupancy and possession, by themselves and their ancestors, are shown by Santiago Garcia Montoya, great-grandson of Francisco Garcia de Noriega, and Nerio Antonio Montano, grandson of Jose Antonio Garcia de Noriega.

In the year 1860 the grant of 1798 was confirmed by the Congress of the United States. This, however, was a mere relinquishment of whatever right the United States had.

BRIEF OF ARGUMENT.

The Court of Private Land Claims dismissed the petition in this case, because, as stated in its desision, (1) the grant was not complete and perfect, and (2) it was abandoned by the original grantees.

The appellants contend that the grant was complete and perfect because everything to be done under it by the grantor or grantee was done.

The grant was made by the officer having authority to make it; it was unconditional in terms, and the grantees took possession in due form of law.

There can be no doubt as to the authority of the governors of New Mexico to make grants of land under the Spanish regime. These officers were appointed by the king in person to hold office during five years, and when death or removal from office occurred the viceroy of New Spain appointed a governor *ad interim* to serve out the unexpired term (Bancroft's History of New Mexico and Arizona, 227). The first *conquisitors* and discoverers entered into contracts with the king, by virtue of which they had conferred upon them the title of governor and captain-general, and the power to grant lands and exercise the chief judicial authority in the province (*ibid.*, 94, 95). The contract of Onate, the first governor, so specified (*ibid.*, 116).

This authority to grant lands seems to have been suspended by the royal cedula of 1735, but it was fully restored to the governors by the regulation of October 15, 1754 (2 White, 49).

The power of the governor to make the grant, however, is not denied by the United States, and it is unquestioned by the court in this case. But, says the court:

> "The law of Spain at the time this session was made required that the land should be actually occupied by the grantees and should be cultivated for the period of four years as conditions of obtaining the legal title to the property. It was also required that proof should be made to the audiencia of the district of the fact of compliance with this law, and that the grant should be confirmed by the audencia before the title should pass from the crown. The evidence contains no hint that the Garcias cultivated any part of the tract for the required period, or that any proof of such cultivation had been made, or that the grant had been confirmed by any officer or body having authority in such matters."

The law of Spain requiring four years' cultivation is in the following words (2 White, 38):

"In order to promote the zeal of our subjects in the discovery and settlement of the Indies, and that they may live in that ease and comfort which we desire them to enjoy, it is our will that there be distributed among them houses, lots, lands, caballerias and peonias, to all who shall repair to settle on new lands in the villages and places which shall be designated to them by the governor of the new settlement, making a distinction between gentlemen or esquires and laborers and those of inferior grade and merit, and graduating such grants according to their qualifications and services, in order that they may attend to working the said land and to the breeding of stock, and when said settlers shall have lived and labored in said settlements during the space of four years they are hereby empowered, from the expiration of said term, to sell the same, and freely to dispose of them at their will as their own property."

This law requires no confirmation by the audiencia, or any other body or person. It is a confirmation in itself—the settlers "are *hereby empowered*, from the expiration of said term, to sell the same," etc. And there is no law or regulation requiring that "proof should be made to the audiencia of the district of the fact of compliance with the law as to four years' settlement."

The royal regulation of October 15, 1754 (2 White, 49), wherein the court probably found alleged authority for holding that the grant "should be confirmed by the audiencia before the title should pass from the crown," provides *also* (section 12) that "in the distant provinces, or where the sea intervenes * * * confirmations shall be issued by their governors;" and the regulation expressly confers upon them all the powers exercised by the district audiencias in respect to confirmations.

New Mexico was an outlying, "distant" province of the viceroyalty of Mexico, its seat of government, Santa Fé, being more than one thousand miles from the royal audience at Guadalajara, to which district it belonged. The country was until recently overrun by savages and communication between these points was infrequent, difficult and dangerous, it some-

times taking months to cover the distance. New Mexico, then, being one of the "distant" provinces its governors had power to issue confirmations.

The general practice of the governors, under the laws and the regulation of 1754, was to make grants without condition, leaving the title open to denouncement. If the grantees wished to convey their interests in the land they had, under *law 2, title 12, liber 4*, to show an actual possession of four years, and the governor always inquired into the performance of this condition before he approved the transfer, the approval being, in effect, a confirmation of the grant. If the grantees never wished to convey their interests the question of confirmation never arose. The records of the Land Court and the archives at Santa Fé show that the governors often sat as an "audience *pro tribunali*" on the confirmation on sales of land.

Time and again, prior to the decision in this case, the court below confirmed, as perfect, grants which had never been before the audiencia of the district, or any audiencia, notably among which is the Rancho del Rio Grande (cited by Mr. Justice Murray in his dissenting opinion), a *pasture* grant covering 109,000 acres, wherein the court held that the title was perfect in 1795—that is, the moment juridical possession was delivered.

1. In the absence of all other evidence, that the governor or other proper officer did confirm this grant will be presumed from the fact that the condition of four years' occupancy annexed by the law was fully performed.

As before shown, an actual confirmation was not necessary under the law as to four years' occupancy (*supra*).

The grantees were placed in juridical possession; ten years afterwards they were asserting title to "lands which we first and in our first grant have been possessing;" the grantees under the second grant admitted their claim to the "lands which they had been so justly possessing;" the alcalde states that they had been occupying the land; there can be no doubt that the Garcias were occupying the land at that time (1798);

and the Land Court itself says that "the archive evidence tends to show that the Garcias occupied the tract and did cultivate upon it prior to 1798," but no "opinion can be formed as to *when* the Garcias *commenced* their occupancy or as to the length of time which they continued to cultivate."

The Garcias were given juridical possession of the tract in 1788. Their actual occupancy *then* began, and the court must assume that they "commenced" their occupancy at that time. On these facts—delivery of juridical possession, actual occupancy for an indefinite time, as stated by the court, claim of occupancy and assertion of title ten years afterwards—the presumption arises that the occupancy was continuous from the date of its inception, and can be overthrown only by the most positive evidence to the contrary.

Hence, having performed the condition of four years' occupancy, at the end of that time they were vested with a perfect title, and were entitled to the evidence of that perfect title, whether such evidence was obtainable from the governor as such, or the governor sitting as a district audience, or whether such evidence is now obtainable from the United States of America under the act of March 3, 1891.

2. The proceedings of 1798 tend to show that the Garcias had a perfect title to the land at that time.

In the certificate of the alcalde on the day of possession under the second grant he records the Garcias as saying, "we have the right to enjoy said lands and to cultivate them with *full* title, as well ourselves, our children, and our *successors*." The Garcias were at that time claiming a title in fee. There can be no doubt as to the meaning of this language if used in a will or deed at common law, and it had the same significance in the Spanish colonies.

They were using the words contained in the laws of Spain, before and since that time, to signify a complete and perfect title (Regulation of 1754, sec. 5; Articles 2 and 18, decree of Cortes of January 4, 1813).

Law 2, title 12, book 4, of the Recopilacion de Leyes de las Indias, was in force at the time of this second grant, and it provides as follows:

> "It shall not be lawful to give or distribute lands in a settlement to such persons as already possess some in another settlement unless they shall leave their former residence and remove themselves to the new place to be settled, except where they shall have resided in the settlement during the four years necessary to entitle them to a fee-simple right, or unless they shall relinquish their title to the same for not having fulfilled their obligation; and we declare null and void any distribution which may be made contrary to the provisions of this our law, and we condemn those who make such distribution to suffer our displeasure"

The Garcias certainly did not "relinquish their title to the same for not having fulfilled their obligations," for the certificate of the alcalde shows that they were claiming a title in fee to the land which they possessed under the first grant. This claim is wholly repugnant to the conditions of the grant of 1798, which expressly confers a limited estate—one which the grantees could not enjoy with *full* title and dispose of at will.

They did not "remove themselves to the new place to be settled." On the contrary, the court finds that they insisted on remaining upon and claiming "the particular portion which they had theretofore been cultivating," and that "they were present, participating in the proceedings for the purpose of protecting their rights in the property."

3. The proceedings of 1808 show that the grant had been confirmed, and that the Garcias had a complete title at that date.

The court finds that these proceedings of 1808 were not judicial. But, however that may be, they were certainly "official." The letter from the governor to the alcalde opens and closes by saying that he is advised of and has answered his "official communication."

The alcalde, in his letter of December 1, requests the governor to "confirm and approve the same [grant] to obviate all

question," to which the governor replies that the matter requires no decision on his part, because the grant to the Garcias makes their right clear, and further because the documents were "sanctioned" by former governors of the province and the royal audience at Guadalajara alone had power to *annul* them.

The "former governors," in the order in which they held office, appear to have been as follows: Concha, Chacon (and apparently Concha and Chacon again, in the same order), Alencaster, Maynez (*ad interim*), and then Manrique (*ad interim*). See Bancroft, 284, 268, *et seq.*

It will be remembered that the granting decree of Governor Concha, in 1788, directs the grant documents, after delivery of juridical possession, "to be copied in the government book and written on stamped paper when it reaches this province." The governor, in 1808, on receipt of this letter from the alcalde, as it was his duty to do, and as we must presume that he did, consulted the "government book" and the copy "written on stamped paper," and found that the grant had been "sanctioned" by one of his predecessors and therefore required no confirmation by him.

Webster defines "sanction" as follows:

> "To ratify; to *confirm;* to give validity or authority to."

He points out the only possible remedy of the junior grantees, which is to the royal audience at Guadalajara, the supreme court of the viceroyalty in land matters, representing the person of the king—a sort of king's bench—to which appeals were taken among others from the governors sitting as district audiences.

In passing, it may not be amiss to note the fact that these two documents, taken together, tend to sustain the contention made in a former portion of this argument, to wit, that the governor of the province was authorized to and did sit as a district audience in the confirmation of grants of land. The

alcalde asks the governor to "confirm and approve" the grant, "to obviate all questions which will necessarily result" if it be not done. The governor replies, after consulting the archives, that no such action is necessary, as the grant has already been confirmed, and the only recourse the junior grantees have, *if any at all,* is to the royal audience at Guadalajara, an appellate tribunal. In other words, he says that one of his predecessors has already sat as a district audience in regard to the grant in question, and his action can be reversed by the king only, acting through the audience of the whole viceroyalty.

These communications, as we have insisted, are "official" on their face, and, turning again to the regulation of 1754, the significance of this term becomes apparent. Section 12, as to the powers of the governors in the distant provinces, further provides:

> "The same officers shall also determine the appeals from the subdelegates who shall have been or shall be appointed in each of said provinces and islands, *without recourse being had to the audiencia or chancery of the district*, unless the two decisions be at variance, and then this is to be *officially* and by way of consultation, to avoid the expenses of appeal."

These proceedings show the exact status of the parties at that time. The grant to the Garcias was subsistent and valid, and required a decree of the royal audience to *annul* it. The burden of showing that it was annulled was upon the junior grantees, and the change of flag has not shifted it.

The very action of the governor in 1808, in that he asserts that the Garcias have the better title, is tantamount to a confirmation, even if we assume that it had not been confirmed before.

The two documents which passed between the governor and alcalde are taken from the archives. It appears that the one purporting to be from the governor is not signed, but this does not impair its validity.

In Sutter's case (21 How., 175) the Supreme Court said:

> "Besides this consistent testimony, there is produced from the archives a grant corresponding to that produced from the county records, except in respect to the signatures. The Governor, Alvarado, testifies that this draft was prepared by him, and from the original issued to Sutter so prepared by the secretary, and that the draft was deposited by his direction, and is now there. The fact that his name is not attached to this draft does not impair its authority under the circumstances of this case."

In the case of Spencer *vs.* Lapsley (20 How., 264) the title to a tract of eleven leagues depended on the weight to be given to a paper purporting to be a grant by the Mexican governor of Texas. This paper was taken from the archives of the Texas land office, and was not only unsigned but without date. Yet the court held that the claimant had a complete title to the land in controversy.

A glance at 2 White (148, 152, 236, 239, 248, 453, *passim*) will tend to show that the practice of retaining an unsigned copy of a document for the archives also obtained in Florida and Louisiana.

The court below treats these two documents as genuine, and we think there can be no question in regard to them.

4. This grant was perfect in 1814.

Under the constitution adopted in 1810, for the first time in its history, New Mexico was entitled to a *deputado*, or representative, at the Spanish cortes. Pedro Bautista Pino was chosen as such, and started on his mission in October, 1811. His influence soon asserted itself, and New Mexico became an object of some importance in the councils of the kingdom. In November, 1812, he presented to the cortes a lengthy and able report on the condition and needs of his province (Bancroft's New Mexico, 288). As a result of this, on January 4, 1813, the cortes decreed that all lands thereafter granted or distributed should be in *full* property; and on June 8, 1813, the same policy was extended to every grant made up to that time, in the following words:

> "All pastures, farms, and other lands of any kind, pertaining to private ownership, whether free or entailed, are declared from now henceforth closed and perpetually confirmed, and the owners and possessors are authorized to inclose them without prejudice to the roads, watering-places, crossings and drains, enjoy them freely and exclusively or rent them, as they may desire, and dispose of them for the purpose of labor, pasturage, or planting, or to the use which is most advantageous to them," etc.

If the grant to the Garcias had not been confirmed prior to the date above-mentioned, this decree dispensed with the necessity of obtaining a confirmation from the district audience, the royal audience, or the king in person.

It will be noted from the record that in the year 1807 (53, f. 94) Francisco Garcia de Noriega, one of the original grantees, was killed by the Indians (27, f. 46; 48, f. 88; 61, f. 107), and it was within a year following the death of this old frontiersman that his brotherly neighbors began to encroach upon the rights of his heirs and of his co-grantee.

ABANDONMENT.

The ground upon which the decision of the court ultimately rests is that of abandonment, and this abandonment is founded upon the assumed fact that the alcalde in 1798 could not have placed the junior grantees in possession of 6,000 varas without encroaching upon the land granted in 1788. It is also assumed that the tracts of 300 varas each were not measured in the form of a square, but that they were laid off according to the custom in that section of country—that is, 300 varas north and south, the sides being the limits of the grant.

The alcalde in 1798 does not say that the distance between the north boundary of the Indian league and the junction of the rivers is 2,100 varas, but that he found a surplus of 2,100 varas "which they had *before* arriving at the Canon de San Diego, all of which they claimed as their own without having

any right to them in any manner." This language can hardly be held to have *no* other meaning than that between the Indian league and the *junction of the rivers*, there were but 2,100 varas.

The court was undoubtedly misled in this respect by the testimony of Jesus Trujillo, for the defendants, who testifies as follows after stating that the "canon" is at the junction of the rivers (56, f. 100):

> "Q. Do you know where the north line of the Indian pueblo lands are in that vicinity?"
> "A. Yes, sir."
> "Q. How far is it from the *canon?*"
> "A. About 400 yards only."
> (57, f. 101).
> "A. They have found that there are 2,100 varas from the Indian league to the junction of the rivers."

J. W. Miller, for the defendants, a much more intelligent witness, testifies as follows (71, f. 121):

> "Q. How far is it from the pueblo of Jemez to the junction of the rivers?"
> "A. Five miles."

If the witness meant that it was five miles from the north line of the Indian lands to the junction of the rivers, then there was ample space to lay off 6,000 varas between these two points. If, on the other hand, he meant that it was five miles from the center of the Indian league, then, according to the way these "leagues" were measured, we have at least two miles, about 4,000 varas, between the north boundary of the Indian lands and the junction of the rivers.

This testimony should have raised a doubt in the mind of the court as to the correctness of Trujillo's statements, who first says that the distance is 400 yards and then says it is 2,100 varas.

The Indian town was in existence in 1798, just as it is to-day, and had been for more than a hundred years prior thereto,

and a league laid off in a northerly direction from its church or center would cover precisely the same ground as it does now. The junction of the rivers is still there.

The south boundary of the tract granted in 1798 is the north boundary of the Indian league. There is in the record a plat taken from the surveyor-general's office which shows the lines of both tracts as officially surveyed (51), one within the other. It shows the junction of the rivers and the south boundary of the tract granted in 1798. A glance at this plat will show that the distance from the south line of the large tract to the junction of the rivers, the south boundary of the tract granted in 1788, is about half the side of a township, the lines of which are on the plat, or three statute miles, which is just sufficient to lay off 6,000 varas of 33 inches each, when we take into consideration that the alcalde, according to the custom of those days, followed the course of the river.

The maps of New Mexico, as published by the General Land Office, clearly disclose this well-known geographical fact. of which the court will take judicial notice.

The theory of abandonment, therefore, being based on an assumption which is wholly at variance with the record and with the geography of the country, must fall to the ground.

In reasoning from this mistaken geographical fact as a premise, the court assumes several other facts which are clearly at variance with the record. We will quote from the decision and point out one or two as we proceed:

> "There are many considerations apparent upon the face of the record bearing upon this question [of abandonment]. The petition for the grant—1798—*signed by the two Garcias*, described the land petitioned for by specific, known natural boundaries, and as being situated in the Canon de San Diego adjoining the boundaries of the lands of the Indians. There was no exception or reservation of the land described in the former grant to the Garcias. The boundaries specified clearly embraced the Garcia tract. The south boundary was south of it, the [north] boundary north of it, the east boundary east of it, and the west boundary west of it."

In the first place, the petition for the grant of 1798 was *not* "signed by the two Garcias." It is in the record, and is *signed by Jose Miguel Garcia alone*, who seems to have been a brother of the two senior grantees.

The petition asked for "vacant land," and the alcalde placed the grantees in possession of "vacant" land without encroaching upon the possessions of the Garcias, as already shown. The proceedings of 1798 show that the small tract was not "vacant."

Even if the grantees had not asked for "vacant land," the tract first granted having already been segregated from the public domain of Spain by virtue of a granting decree and juridical possession under and in accordance with the forms of law, no "exception or reservation" was necessary. It is hardly necessary to cite authorities on this fundamental proposition, and we will merely refer to Mr. Justice Murray's dissenting opinion (43, f. 78).

The court continues:

> "Looking at the face of the petition, then, the governor was justified in regarding it as in the nature of a request to him on the part of the Garcias to make to the twenty petitioners a grant of the whole tract within the boundaries specified, and as a waiver or release of all claim to any part of the lands by virtue of the grant of 1788. This consideration may explain the peculiar language used in the order making the grant. He says: 'In view of the foregoing petition in regard to settling in the Canon de San Diego, where the interpreters of the Navajos were temporarily stationed, I grant the aforesaid lands with the express condition that it be settled by at least twenty citizens, and the lands are to be distributed in equal parts.' This seems to show that the central feature of the grant was the exact land which had theretofore been occupied by the Garcias in the Canon de San Diego."

The peculiar language of the grant in regard to the settlement of the tract by at least twenty persons, was because, as

before stated, the petition was signed by one man only, and the governor wished to be sure that the alleged object of the petition was carried out, viz: that at least twenty citizens should receive the large tract of land and not one man only, and that the signer of the petition should not receive more than one-twentieth of the whole.

The presumption that it was the exact land covered by the grant of 1788 does not arise from the mere use, by the governor, of the words "Canon de San Diego [de Jemez] where the interpreters of the Navajos were temporarily stationed." Even if "interpreters of the Navajos" and "the Garcias" were convertible terms, it does not follow that the tract granted in 1788 was meant, for the Garcias may have been "stationed" between the Indian league and the junction of the rivers prior to the time of their petition for the senior grant—in fact, it may have given them the opportunity to discover that the land they asked for in 1788 was vacant. And it is nowhere in evidence that the grant to the Garcias included the whole of the Cañon de San Diego—on the contrary, it was a tract of land within the cañon, with fixed, natural boundaries. This fact is constantly lost sight of by the court below.

Then, too, there was not the slightest evidence before the governor that the land granted to the Garcias had been abandoned, and to say that this dictum would divest them of their rights in the premises is repugnant to the rule adopted in this very case by the court below as to the proceedings of 1808, to wit:

> "To say that such a proceeding was a judicial determination affecting property rights, was binding on the crown or anyone else, would be an imputation upon Spanish justice and Spanish law. The governor may have been the supreme judicial officer of the province, but he was bound by rules of judicial procedure, and had no power to affect property rights without a hearing."

The court further says:

> "The letter of Vergara to the governor shows that the whole of the Cañon de San Diego was settled under the grant of 1798."

What the alcalde does say is that "the whole of the *Jemez* cañon having been settled," etc., not the "whole of the Cañon de San Diego." The Jemez river—and from the river the cañon takes its name—begins at the confluence of the San Diego and Gaudalupe creeks (24, f. 41; 25, f. 43; 49, f. 89; 56, f. 100), and flows southward to the Indian league; so that when the alcalde asserted that the whole of the "Jemez" cañon had been settled under the junior grant, he asserts merely what the evidence shows, to wit, that all the land between the Indian league and the junction of the rivers was settled. This is another geographical fact which the official maps of New Mexico disclose, and of which the court will take judicial notice.

In some mysterious manner the court construes the proceedings of 1798, so far as the Garcias were concerned, into a "contract" with the grantees under the second grant, and then proceeds.

> "The suggestion may occur to the mind that, as the petition asked for 'vacant and uncultivated' land, this operated as a reservation of the land covered by the first grant from the second grant. If this was the understanding of the Garcias themselves (1) why did they require the contract from their co-grantees guaranteeing in the distribution to them the particular part they had cultivated, and (2) why did they permit the new settlers to take possession of the whole cañon, and (3) why did they accept 300 varas as their part in the distribution?"

The court fails to find satisfactory answers to these questions and confirmation is therefore refused.

(1) The record discloses not the slightest evidence of any "contract" between the Garcias and their co-grantees. The

notice given by the Garcias in 1798 was after the junior grantees had been placed in possession of their 6,000 varas, for the alcalde says: "There being assembled all the citizens who *took* possession of the said cañon," etc. The Garcias were there claiming the lands which they had been possessing under their first grant, to "enjoy said lands and to cultivate them with full title, as well ourselves, our children and our successors." It would be absurd and idle to give this warning if their lands were already taken from them and allotted to the junior grantees. The court finds that they "were present, participating in the proceedings for the purpose of protecting their rights in the property." "Their rights in the property" were their rights under the grant of 1788.

(2) The new settlers took possession of the "whole of" the Jemez cañon, as indicated by the alcalde's certificate. Their 6,000 varas were laid off between the north boundary of the Indian league and the junction of the rivers, the south boundary of the tract granted in 1788. The grant of 1788 did not cover the whole of the Cañon de San Diego, but a portion of it only, between fixed boundaries, and this fact is more apparent when we look at the testimony of the defendants' witnesses, one of whom states that the Cañon de San Diego reaches the Indian league. The tract granted in 1788, however, was three miles beyond that point.

(3) The two Garcias had a perfect right under the law of Spain to "accept" 300 varas under the second grant, and still retain their possessions under the first. The law in force was *law 2, title 12, liber 4*, quoted in full *supra*.

This law requires merely that the settler shall have resided on the tract for the four years necessary to entitle him to a fee-simple right. As already clearly shown, the Garcias did not "leave their former residence." They did not "relinquish their title to the same for not having fulfilled their obligation," for they were there claiming a fee-simple right, apparently under this law, and everyone present admitted that right.

Then, having resided on the land four years, they could accept 300 varas under the second grant without in any manner jeopardizing their rights under the first.

POSSESSION.

The documentary evidence shows that the Garcias were placed in juridical possession in 1788; that ten years afterwards they were still in possession; and that ten years after that, or twenty years from the time of making the grant, they or their heirs were still in possession.

Santiago Garcia y Montoya, great-grandson of Francisco Garcia de Noriega, a witness for the claimants, testifies that he was born upon the smaller tract about 1827 and lived there for twenty years (24, f. 46); Antonio Garcia de Noriega, one of the original grantees, also lived on the tract with his family, and died there in the year 1835, after which his family moved nearer the junction of the rivers; he saw the grant papers in the hands of Nerio Antonia Montoya about the year 1840.

Nerio Antonio Montoya, grandson of José Antonio Garcia de Noriega, the other original grantee, lived on the land from 1822 with his mother, the daughter of José Antonio Garcia de Noriega; she died in 1852; the grant papers were in possession of his grandfather, on whose death they passed to his mother, and then to him; he has improvements upon the tract; lived upon and cultivated it until 1879.

Jesus Trujillo, for the defendants, testifies that he lives "at the Cañon de San Diego" (56, f. 99), but he afterwards states that he lives at the edge of the Indian league (57, f. 101), which is below the junction of the rivers, and entirely outside the smaller tract (59, f. 104). It is attempted to prove by this witness that an adverse possessor, José Francisco Archuleta, occupied and cultivated lands within the boundaries of the tract granted in 1788, but he says that Archuleta's residence was 600 yards north of the "springs" (63, f. 109), and the springs he refers to are not within the small tract (61, f. 107).

The next witness, Emiterio Archuleta, shows that there was but one man, so far as he knows, who lived on the smaller tract during the whole time he knew it; however, he was not born until 1847 (64, f. 110). This man is the son of Archuleta, who resided 600 yards north of the "springs," and outside the smaller tract; in any event, his father did not go there until 1865 (64, f. 111); before that he resided in the Cañon de Guadalupe (67, f. 115), where he lived all his life until he went up near the springs (59, f. 104), and where the witness was, therefore, born—not on the smaller tract, as his testimony would lead one to believe (64, f. 110). The Cañon de Guadalupe is not within the small tract.

Francisco Perea, the next witness, shows that the town of "Cañon" is located in the Cañon de Guadalupe (68, f. 116); there was no one living in the Cañon de San Diego, so far as he knows, from the first time he knew anything about the small tract until 1864 or 1865, when José Francisco Archuleta, the settler near the "springs" above referred to, went there to live.

Juan Martin, the next witness, shows that the land which he inherited from his father lies in the Cañon de Guadalupe (70, f. 119), which, as before stated, is outside the small tract.

It is sought to prove by J. W. Miller (71, f. 120) that Juan Martin, who just testified, lives within the smaller tract, but this he utterly fails to do; and, wherever Martin lives, he has been there but nineteen years, long after the change of flag (71, f. 121).

Antonio José Garcia testifies (72, f. 121) that he and his wife are descendants of the two original grantees of 1788; the land he holds by purchase is below the junction of the rivers (72, f. 122), and outside the small tract.

J. W. Miller is recalled, but the land claimed by him is not shown to be within the smaller tract (73, f. 123, 124); the Archuleta land has already been shown to be outside the small tract, and Archuleta did not acquire possession until after

1864; he does not know whether his grantors claim as heirs of the grantees of 1788 or by right of squatter sovereignty.

Jesus Trujillo, the first witness, is recalled (73, f. 124), but he utterly fails to discriminate between "Cañon de San Diego" and the small tract. He has already testified (57, f. 101) that when he was a boy he did not know of or see any one occupying land north of the junction of the rivers, but he did see some people there 17 years before he was born, and that when the people returned in 1843 they did not settle on the smaller tract (62, f. 108); after bethinking himself over night, however, he says (73, f. 124) he saw some persons living in the "Cañon de San Diego" "from the year twenty," when he was about five years old; some were living north of the junction of the rivers, and some south of it, but it is difficult to persuade him to tell which is which. These people were apparently driven off by the Indians in 1837 (74, f. 125):

> "Q. When did they return?
> "A. In the year '43.
> "Q. What did they do when they came back?
> "A. They made the small towns in the Cañon de San Diego and the Cañon de Guadalupe.
> "Q. What are those towns now called?
> "A. Cañon de San Diego and Cañon de Guadalupe."

In the absence of evidence to the contrary, it must be assumed that they "returned" and "went back" to the place they left when driven off. This witness has already shown that when they "returned" and "went back" they did not settle on the small tract (62, f. 108); he resides wholly outside the smaller tract (59, f. 104), and knows very little about it (63, f. 109). Archuleta resided at El Rilleto all his life until he went to the "springs;" he did not go to the springs until 1865 (59, f. 104); up to that time he resided in the Cañon de Guadalupe (67, f. 115); hence it follows that El Rillito, which this witness states is "above the junction of the rivers" about "two thousand varas" in the "Cañon de San Diego" is

entirely outside the small tract. This is the same witness who testified that it was but 400 varas from the Indian league to the junction of the rivers, and afterwards states that it is 2,100 varas between the same points; both of which statements are shown to be absolutely false by the testimony of J. W. Miller (an American witness apparently), by the plat in the record and by the maps of the country as published under authority of the United States, as before shown. He has "Cañon de San Diego" on his mind, and calls everything within the boundaries of the large tract "Cañon de San Diego," "cañon," "Cañones." The same thing may be said of all these Mexican witnesses, as clearly disclosed all through the record, and their testimony should be very carefully weighed by the court.

B. S. Rodey, attorney for some of the defendants, claims through Archuleta, whose lands are not within the small tract; and, if they are, he did not settle until 1865, long after the change of flag.

In conclusion, we respectfully refer to the able dissenting opinions of Justices Stone and Murray (34, 35).

We submit that this grant has long been complete and perfect, by virtue of the laws of Spain, including prescription, and should be confirmed as such.

Respectfully submitted,

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Attorney for Appellants.

ASSIGNMENT OF ERRORS.

1st. Error in holding that Grantees relinquished their rights under the grant of 1788.

2nd. Error in finding contrary to the evidence produced.

3rd. Error in holding that Grantees ever aban[illegible]ned tract prior to 1798.

4th. Error in holding that Grantees ever abandoned tract.

5th. Error in not holding title was perfect at date of change of flag.

6th. Error in not holding that Grantees had perfect title by prescription.

7th. The Court erred in not holding that the Petitioners in this case were entitled to a confirmation of their grant.

8th. Error in not holding title perfect in 1798.

9th. Error in not holding title perfect in 1808.

10th. Error in not holding title perfect in 1813.

11th. Error in not holding title to be perfect at ~~time of~~ date of change of flag.

12th. Error in findings wholly at variance with the record.